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No. 99-1884

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

LACKAWANNA COUNTY DISTRICT ATTORNEY; THE ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA,
Petitioners

v.

EDWARD R. COSS, JR.,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Federal Public Defender for the
Middle District of Pennsylvania

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Counsel for Respondent,
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10 pp

QUESTION PRESENTED

DOES THE CUSTODY REQUIREMENT OF THE FEDERAL HABEAS CORPUS STATUTE PRECLUDE, UNDER ALL CIRCUMSTANCES, A CHALLENGE UPON A FULLY EXPIRED CONVICTION THAT WAS USED TO ENHANCE A CURRENT CONVICTION UNDER HABEAS ATTACK AND FOR WHICH THE PETITIONER IS PRESENTLY IN CUSTODY?

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STATEMENT OF THE CASE

By published *en banc* decision filed February 29, 2000, the United States Court of Appeals for the Third Circuit granted conditional relief under 28 U.S.C. §2254 to respondent Edward R. Coss, Jr., an individual presently serving a sentence of incarceration in the Pennsylvania prison system. Coss v. Lackawanna County District Attorney, 204 F.3d 453 (3rd Cir. 2000) (*en banc*). The Court of Appeals found that in imposing the sentence currently being served, the state sentencing court had taken into consideration a prior Pennsylvania conviction for simple assault, a conviction alleged by the defendant to have been unconstitutionally secured. Id. at 459. Upon review of the evidence presented to the district court, the Third Circuit found that the prior conviction for simple assault had indeed been obtained in violation of the defendant's Sixth Amendment right to effective assistance of counsel. Id. at 461-464. Based upon this finding of ineffective assistance, plus a finding that the current sentence had been influenced by the tainted conviction, the Third Circuit issued a conditional writ of habeas corpus. Id. at 459, 467. The Commonwealth now seeks a writ of certiorari, arguing that there is a split among the circuits regarding the proper resolution of a relevant question left open by this Court in Custis v. United States, 511 U.S. 485, 114 S.Ct. 1732 (1994) (Petition for Writ of Certiorari at 7-9).

REASONS FOR DENYING THE WRIT

BECAUSE OF AN UNUSUAL PROCEDURAL CIRCUMSTANCE, TO-WIT, A BREAKDOWN IN THE PENNSYLVANIA POST-CONVICTION PROCESS, THIS CASE IS A POOR VEHICLE FOR RESOLVING THE QUESTION LEFT OPEN IN CUSTIS V. UNITED STATES.

In Custis v. United States, 511 U.S. 485, 114 S.Ct. 1732 (1994), this Court held that, with the exception of Gideon challenges, defendants at federal sentencing hearings were precluded from attacking the constitutional validity of prior state convictions used to enhance the federal sentence. While emphasizing that the federal sentencing hearing was not a proper forum to challenge the constitutionality of prior convictions, this Court noted that the defendant was free to return to state court, where he could pursue his challenge to the constitutionality of the prior convictions; if the defendant was successful in challenging the prior convictions, he could then apply to re-open the federal sentence. Id., 511 U.S. at 497, 114 S.Ct. at 1739. Although this Court expressed no opinion on the appropriate disposition of such an application, Id., the circuit courts are in agreement that where a defendant is successful in overturning his prior state court convictions, the federal district court has the authority to reconsider any

federal sentence which was enhanced by those convictions. See Ryan v. United States, __ F.3d __, 2000 WL 715005, *4 and *8 (7th Cir., June 5, 2000) (collecting cases).

The circuit courts are not in agreement, however, regarding how to treat the case where a prisoner, state or federal, challenges the sentence currently being served without first having attempted to challenge his prior convictions through available state court post-conviction remedies. This question was recently addressed by the Seventh Circuit in Ryan v. United States, __ F.3d __, 2000 WL 715005 (7th Cir., June 5, 2000). In the majority opinion written by Judge Easterbrook, the Seventh Court held that the prisoner could not collaterally attack his prior state court conviction where he had failed to take advantage of available state court post-conviction remedies. A dissenting opinion in Ryan, written by Judge Wood, criticizes the approach taken by Judge Easterbrook as a departure from settled case law.

The instant case is not a proper vehicle for resolving the dispute reflected by Ryan. This is because of a critical difference between the fact pattern in Ryan and the fact pattern in the instant case. Ryan dealt with a prisoner who had failed to

make any attempt to challenge his prior conviction through available state post-conviction procedures. In the instant case, by contrast, defendant Coss made a timely attempt to challenge his prior conviction, but was thwarted by a breakdown in the state court post-conviction process.

The record reflects that seven years prior to the filing of his federal petition for post-conviction relief, Mr. Coss filed a state post-conviction petition attacking the prior conviction for simple assault. Coss v. Lackawanna County District Attorney, supra, 204 F.3d at 460. The record further reflects that the Court of Common Pleas of Lackawanna County failed to take any action on his petition. Id. Given that Mr. Coss's attempt to exhaust his state court remedies was ignored by the state court for seven years, the Third Circuit held that the exhaustion requirement had properly been excused by the district court. Id.

The breakdown in the Pennsylvania post-conviction process, and the resulting frustration of the prisoner's attempt to exhaust his state court remedies, make this case a poor vehicle for resolving the issue debated by the majority and the dissent in Ryan v. United States. The seven years of state court inaction is an unusual factual circumstance which would limit the precedential utility of any

Supreme Court decision. Additionally, the decision in Ryan is less than one month old, and has yet to percolate through the federal courts. For these reasons, the Court should await a case which more closely matches the fact pattern presented in Ryan.

CONCLUSION

WHEREFORE, it is respectfully requested that the Commonwealth's petition for writ of certiorari be denied.

Respectfully submitted,

Date: June 23, 2000

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CERTIFICATE OF BAR MEMBERSHIP

I, Daniel I. Siegel, of the Federal Public Defender's Office, hereby certify that I am a member of the Bar of this Court.

Respectfully submitted,

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